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Indranika Jaya Sdn Bhd v Nikodemus ak Singai & Ors

B HIGH COURT (KUCHING) — SUIT NO KCH–23NCvC–1/2 OF 2016
LIM HOCK LENG JC
26 JUNE 2018

C *Tort — Trespass to land — Damages — Plaintiff sued defendants for trespass and claimed for damages — Whether trespass proven — Whether special damages proven — Whether exemplary and aggravated damages proven — Whether plaintiff ought to be given nominal damages — Whether prohibitory injunction ought to be granted*

D The plaintiff was the registered proprietor of three pieces of land known as Lots 159 and 160 of Block 10 and Lot 157 of Block 16 ('the subject land'). In an earlier action ('the previous proceedings') brought by the defendants against the plaintiff, the defendants claimed for native customary rights over the subject land. On 18 January 2010, the High Court in the previous proceedings E allowed the striking out application of the previous proceedings filed by the plaintiff and held the plaintiff's titles to be indefeasible. An appeal was filed by the defendants, nevertheless, the said appeal was withdrawn by the defendants' solicitors on 8 June 2012. In the present action, the plaintiff sued the defendants for trespassing the subject land. Broadly, the plaintiff claimed for: F (a) losses amounting to RM624,859 from blockade, prevention from harvesting ripened fresh fruit bunches ('FFB') and prevention of vehicles from transporting harvested FFB; (b) losses amounting to RM1,087,000 for loss of use of machinery; and (c) RM 104,732.21 being the staff productivity losses at the plaintiff's plantation office and Sibu office, and loss of director's fee.

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Held, granting prohibitory injunction and nominal damages of RM20,000 to the plaintiff with costs of RM30,000:

(1) The defendants' contention that they had 'won their first case at the end H of a full trial' and that 'they did instruct their counsel to appeal' was clearly not justification for their presence on the subject land. They knew or ought to have known that the plaintiff's ownership of the subject land could not be disputed after the appeal was confirmed to have been withdrawn by their previous solicitors on 8 June 2012. Even if the I defendants were genuinely under the impression that they had won in the previous proceedings, that would not exculpate them from liability (see paras 22–23).

(2) The defendants did not deny that they were present on the subject land together with 60–70 followers without the plaintiff's consent. The

plaintiff's witnesses were not cross-examined on these aspects, with a view to establish facts to the contrary. Thus, the unchallenged evidence would be deemed to be true. Further, from the evidence, it would seem clear that the defendants and their 60–70 followers were trespassing on the subject land from 29 January 2016–6 February 2016, as such, the trespass took place over a period of about eight days (see paras 25–26 & 35).

(3) The plaintiff had not proven on the balance of probabilities that it had suffered losses as a result of its plantation workers being prevented from harvesting FFB during the trespass period and from rotten FFB. The plaintiff had failed to show causal link between the defendants' trespass and the alleged losses, for the following reasons: (a) prevention from harvesting during trespass period did not result in tangible loss; (b) any FFB ripened before the trespass started were transported out; and (c) no satisfactory evidence of FFB rotting as a result of the trespass. The plaintiff's claims of RM147,329 and RM477,530 for the 'loss of FFB' in January and February 2016 were thus rejected by the court (see paras 55–56).

(4) Based on the evidence, only a few lorries were used each day to transport the harvested FFB, as such, the claim for rental of 100 vehicles was clearly exaggerated. Further, the claim for hourly rental of 100 vehicles on a daily basis was multiplied by ten days, whereas the trespass was over a period of eight days. The rental was claimed for ten hours per day. No reason was given as to why the vehicles needed to be rented for ten hours each day, whether they were used for ten hours each day, whether the purported rental charged were commercial rates and so on. The manner in which the plaintiff attempted to prove its purported loss of RM1,087,000 for idling vehicles and machineries/equipment was unsatisfactory (see paras 60–61 & 65–66).

(5) From the cross-examination testimony of the plaintiff's accountant/finance manager ('PW5'), it emerged that while the plantation workers were prevented from working or harvesting, the office workers were working normally. Although PW5 inconsistently testified that the office workers had to do additional work, he did not give evidence on whether the plaintiff had paid them extra remuneration on account of the additional work. With regards to the Sibu office, PW5 admitted that no overtime was paid. In any case, the claim for purported losses for a director's salary and the Sibu office staff was too remote (see paras 70 & 73–74).

(6) The plaintiff had failed to discharge its burden of proving that it had suffered the special damages but that did not mean the plaintiff would not get any relief or recompense. Nominal damages could and ought to be awarded. The plaintiff had proved that its lorries were prevented from

delivering FFB to the mill and that its workers were prevented from working but did not prove the amount of its loss. Based on the circumstances, the court held that an award of RM20,000 as nominal damages should suffice (see paras 82 & 86–88).

(7) The plaintiff could not recover exemplary damages as the circumstances of the case did not fall into either of the two categories identified by Lord Devlin in *Rookes v Barnard* [1964] AC 1129 (adopted by our courts, for instance, in *Kerajaan Negeri Selangor & Ors v Sagong bin Tasi & Ors* [2005] 6 MLJ 289). With regards to aggravated damages, the witness statements of the plaintiff's managing director, accountant and land settlement officer did not disclose any evidence of mental anxiety or distress; neither did their cross-examination testimony. There was thus no justification for an award of aggravated damages. Further and/or alternatively, the plaintiff was a limited company which by legal creativity was an artificial entity incapable of feelings, distinct from its shareholders, as such, the plaintiff could not be the recipient of an award of aggravated damages for injury to its feelings (see paras 89, 92–93 & 97).

(8) It appeared that the defendants would continue to trespass onto the plaintiff's subject land as they throughout the trial maintained that they had existing farms there. Further, the plaintiff's witness gave evidence that the defendants had returned to the plaintiff's subject land after 6 February 2016. The court therefore granted prohibitory injunctions (see paras 100–101).

[Bahasa Malaysia summary

Plaintif ialah tuan punya berdaftar tiga bidang tanah yang dikenali sebagai Lot 159 dan 160, Blok 10 dan Lot 157, Blok 16 ('tanah yang dimaksudkan'). Dalam suatu tindakan awal, ('prosiding sebelum ini') yang dibawa oleh defendan terhadap plaintif, defendan menuntut hak adat anak negeri ke atas tanah yang dimaksudkan. Pada 18 Januari 2010, Mahkamah Tinggi dalam prosiding sebelum ini membenarkan permohonan pembatalan prosiding sebelum ini yang difailkan oleh plaintif dan memutuskan bahawa hakmilik plaintif ke atas tanah yang dimaksudkan itu tidak boleh disangkal. Rayuan telah difailkan oleh defendan, walau bagaimanapun, rayuan itu telah ditarik balik oleh peguamcara defendan pada 8 Jun 2012. Dalam tindakan ini, plaintif telah menyaman defendan kerana menceroboh tanah yang dimaksudkan. Plaintif menuntut: (a) kerugian yang berjumlah RM624,859 daripada sekatan, halangan daripada menuai buah-buahan segar ('BBS') dan halangan ke atas kenderaan daripada membawa BBS yang dituai; (b) kerugian yang berjumlah RM1,087,000 bagi kehilangan kegunaan jentera; dan (c) RM104,732.21 yang merupakan kerugian produktiviti pekerja di pejabat perladangan plaintif dan pejabat di Sibu, dan kehilangan fi pengarah.

Diputuskan, membenarkan injunksi larangan dan ganti rugi nominal berjumlah RM20,000 kepada plaintif dengan kos sebanyak RM30,000:

(1) Hujahan defendan bahawa mereka telah 'berjaya dalam kes pertama mereka di akhir perbicaraan penuh' dan bahawa 'mereka telah mengarahkan peguam mereka untuk merayu' adalah jelas bukan merupakan justifikasi bagi kehadiran mereka dalam tanah yang dimaksudkan. Mereka mengetahui atau sepatutnya mengetahui bahawa pemilikan plaintif ke atas tanah yang dimaksudkan tidak boleh dipersoalkan setelah rayuan disahkan telah ditarik balik oleh peguam cara mereka yang terdahulu pada 8 Jun 2012. Walaupun defendan secara jujurnya mempercayai bahawa mereka telah menang dalam prosiding sebelum ini, hal itu tidak membebaskan mereka daripada liabiliti (lihat perenggan 22–23).

(2) Defendan tidak menafikan bahawa mereka berada dalam tanah yang dimaksudkan itu bersama-sama 60–70 orang pengikut tanpa persetujuan plaintif. Saksi plaintif tidak disoal balas tentang aspek ini, dengan tujuan untuk membuktikan fakta yang sebaliknya. Oleh yang demikian, keterangan yang tidak tercabar itu boleh disifatkan sebagai benar. Selanjutnya, berdasarkan keterangan, jelas kelihatan bahawa defendan bersama-sama dengan 60–70 orang pengikut mereka telah menceroboh tanah yang dimaksudkan mulai 29 Januari 2016–6 Februari 2016, maka, pencerobohan itu mengambil masa selama tempoh lebih kurang lapan hari (lihat perenggan 25–26 & 35).

(3) Plaintif tidak membuktikan atas imbangan kebarangkalian bahawa ia telah mengalami kerugian akibat daripada pekerja ladang mereka telah dihalang daripada menuai BBS semasa tempoh pencerobohan itu dan daripada merosakkan BBS itu. Plaintif telah gagal menunjukkan hubungan antara pencerobohan oleh defendan dengan kerugian yang dikatakan dialami, atas sebab yang berikut: (a) halangan daripada menuai semasa tempoh pencerobohan itu tidak menyebabkan apa-apa kerugian yang ketara; (b) apa-apa BBS yang telah masak sebelum pencerobohan bermula hendaklah dibawa keluar; dan (c) tiada keterangan yang memuaskan hati yang menunjukkan bahawa BBS itu telah rosak akibat pencerobohan itu. Atas alasan itu, tuntutan plaintif berjumlah RM147,329 dan RM477,530 bagi 'kerugian BBS' dalam bulan Januari dan Februari 2016 telah ditolak oleh mahkamah (lihat perenggan 55–56).

(4) Berdasarkan keterangan, hanya beberapa lori sahaja yang digunakan setiap hari untuk membawa BBS yang dituai, maka, tuntutan bagi sewaan 100 kenderaan adalah jelas suatu tuntutan melampau. Selanjutnya, tuntutan bagi sewaan harian mengikut tiap-tiap jam digandakan sebanyak sepuluh hari sedangkan pencerobohan adalah dalam tempoh lapan hari. Sewaan dituntut bagi sepuluh jam sehari.

Tiada alasan diberikan tentang mengapa kenderaan itu perlu disewakan untuk sepuluh jam setiap hari, sama ada ia digunakan untuk sepuluh hari setiap hari, sama ada sewaan yang dicajkan merupakan kadar komersial dan sebagainya. Cara plaintif mencuba untuk membuktikan kerugian yang dianggarkan berjumlah RM1,087,000 bagi kenderaan dan jentera/peralatan yang terbiar adalah tidak memuaskan (lihat perenggan 60–61 & 65–66).

(5) Berdasarkan testimoni soal balas akauntan/pengurus kewangan plaintif ('SP5'), adalah jelas bahawa semasa pekerja ladang dihalang daripada bekerja atau menuai, pekerja di pejabat bekerja seperti biasa. Walaupun SP5 memberikan keterangan secara tidak konsisten bahawa pekerja di pejabat perlu melakukan kerja tambahan, dia tidak memberi keterangan sama ada pihak plaintif telah membayar gaji tambahan atas sebab kerja tambahan yang dibuat. Berhubung dengan pejabat di Sibu, SP5 mengakui bahawa tiada bayaran kerja lebih masa telah dibayar. Dalam apa-apa kes, tuntutan bagi kerugian bagi gaji pengarah dan pekerja pejabat di Sibu adalah terlalu kecil (lihat perenggan 70 & 73–74).

(6) Pihak plaintif telah gagal melepaskan beban pembuktian bahawa ia telah mengalami ganti rugi khas tetapi itu tidak bermakna bahawa plaintif tidak akan mendapat apa-apa relif atau diberi pampasan. Ganti rugi nominal boleh dan patut diberikan. Pihak plaintif telah membuktikan bahawa lori-lori miliknya telah dihalang daripada menghantar BBS ke tempat pengisaran dan pekerjanya telah dihalang daripada bekerja tetapi tidak membuktikan amaun kerugian yang ditanggungnya. Berdasarkan hal keadaan itu, mahkamah memutuskan suatu award berjumlah RM20,000 sebagai ganti rugi nominal adalah memadai (lihat perenggan 82 & 86–88).

(7) Plaintif tidak boleh memperoleh ganti rugi teladan kerana hal keadaan kes ini tidak termasuk dalam mana-mana dua kategori yang dikenal pasti oleh Lord Devlin dalam *Rookes v Barnard* [1964] AC 1129 (yang diterima pakai oleh mahkamah di Malaysia, contohnya, dalam kes *Kerajaan Negeri Selangor & Ors v Sagong bin Tasi & Ors* [2005] 6 MLJ 289). Berhubung dengan ganti rugi teruk, penyataan saksi tentang pengarah urusan, akauntan dan pegawai penyelesaian tanah pihak plaintif tidak menunjukkan apa-apa keterangan mengenai kebimbangan mental atau kesedihan; begitu juga testimoni soal balas mereka. Oleh yang demikian, tiada justifikasi bagi suatu award bagi ganti rugi teruk. Selanjutnya dan/atau secara alternatifnya, plaintif merupakan sebuah syarikat berhad yang merupakan sebuah entiti tiruan yang tidak mempunyai perasaan, berbeza dengan pemegang syernya, maka, plaintif tidak boleh menjadi penerima bagi suatu award ganti rugi teruk bagi kecederaan kepada perasaannya (lihat perenggan 89, 92–93 & 97).

(8) Defendan dilihat akan meneruskan pencerobohan ke atas tanah plaintif

yang dimaksudkan memandangkan sepanjang perbicaraan mereka tegas menyatakan bahawa mereka mempunyai kebun sedia ada di situ. Selanjutnya, saksi plaintif memberi keterangan bahawa pihak defendan telah kembali ke tanah plaintif yang dimaksudkan selepas 6 Februari 2016. Mahkamah dengan ini membenarkan injunksi larangan (lihat perenggan 100–101).]

Notes

For cases on damages on tresspass to land, see 12(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 2421–2437.

Cases referred to

ATU and others v ATY [2015] 4 SLR 1159, HC (refd)
Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal [1995] 2 MLJ 770; [1995] 3 CLJ 639, CA (refd)
Amm a/l Joy (suing as Chairman Committee Members of Wat Boonyaram) v Chuan Seng Sdn Bhd [2018] 5 MLJ 255; [2018] 1 LNS 474, CA (refd)
Awang Osen bin Awang Mat v Norhazlena bte Abdurani & Ors [2004] 4 MLJ 238; [2004] 7 CLJ 1, HC (refd)
Bonham-Carter v Hyde Park Hotel Ltd 64 TLR 177, KBD (refd)
Collins Stewart Ltd v The Financial Times Ltd (No 2) [2006] EMLR 5, QBD (refd)
Dodd Properties (Kent) Ltd & Anor v Canterbury City Council and others [1980] 1 All ER 928, CA (folld)
Dr Hari Krishnan & Anor v Megat Noor Ishak bin Megat Ibrahim & Anor and another appeal [2018] 3 MLJ 281; [2018] 3 CLJ 427, FC (refd)
Eaton Mansions (Westminster) Ltd v Stinger Cia de Inversion SA [2013] EWCA Civ 1308, CA (refd)
Guan Soon Tin Mining Co v Wong Fook Kum [1969] 1 MLJ 99, FC (refd)
Hartecon JV Sdn Bhd & Anor v Hartela Contractors Ltd [1996] 2 MLJ 57, CA (refd)
Hays plc v Hartley [2010] EWHC 1068, QBD (refd)
Kerajaan Negeri Selangor & Ors v Sagong bin Tasi & Ors [2005] 6 MLJ 289; [2005] 4 CLJ 169, CA (refd)
KPM Khidmat Sdn Bhd v Tey Kim Suie [1994] 2 MLJ 627; [1994] 3 CLJ 1, SC (refd)
Kris Angsana Sdn Bhd v Eu Sim Chuan @ Eu Sam Yan & Anor [2007] 5 MLJ 13; [2007] 4 CLJ 293, CA (refd)
Kwong Hing Realty Sdn Bhd v Malaysia Building Society Bhd (American International Assurance Co Ltd, Third Party) [1997] 5 MLJ 670; [1997] 1 CLJ Supp 167, HC (refd)
Lay Hong Food Corp Sdn Bhd (previously known as Lay Hong Poultry Processing Sdn Bhd) v Tiong Nam Logistics Solutions Sdn Bhd [2018] 2 MLJ 66; [2017] 10 CLJ 680, CA (refd)

A *Messenger Newspapers Group Ltd v National Graphical Association* [1984] IRLR 397, QBD (refd)
Metropolitan International Schools Ltd v Designtechnica Corporation [2010] EWHC 2411, QBD (refd)
Nikodemus Singai & Ors v Sibu Slipway Sdn Bhd & Ors [2010] MLJU 2212; [2010] 10 CLJ 383, HC (refd)
B *Nikodemus Singai & Ors v Sibu Slipway Sdn Bhd & Ors* [2015] MLJU 646; [2016] 1 CLJ 618, HC (refd)
Rookes v Barnard [1964] AC 1129, HL (distd)
C *Sambaga Valli a/p KR Ponnusamy v Datuk Bandar Kuala Lumpur & Ors and another appeal* [2018] 1 MLJ 784; [2017] 1 LNS 500, CA (folld)
Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd [1994] 3 MLJ 777; [1995] 1 CLJ 15, FC (refd)
Teik Huat Farming Sdn Bhd & Ors v Megat Ahmad Shahrani Sdn Bhd & Ors [2016] 8 MLJ 532; [2015] 9 CLJ 511, HC (refd)
D *Terra Damansara Sdn Bhd v Nandex Development Sdn Bhd* [2006] 6 MLJ 24; [2006] 8 CLJ 657, HC (refd)
Utusan Melayu (M) Bhd v Othman bin Hj Omar [2017] 2 MLJ 800; [2017] 2 CLJ 413, CA (refd)
E *WLP Industrial Solutions (M) Sdn Bhd v KL-Kepong Rubber Products Sdn Bhd* [2011] 6 MLJ 623; [2011] 1 LNS 818, HC (refd)

Legislation referred to

Evidence Act 1950 ss 65, 103
F Land Code (Cap 81) s 132(1)

Yong Sie Mee (Peter Hii and Felicity Thomas with him) (Suhaili & Bong Advocates) for the plaintiff.
Dominique Ng (Dominique Ng & Assoc) for the defendants.

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Lim Hock Leng JC:

[1] The plaintiff is the registered proprietor of three parcels of land, in respect of which it frames its causes of action against the first to fifth defendants
H in trespass.

[2] These three parcels of land were originally known as Lots 162, 164 and 173 in the Sedilu-Gedong Land District, and then as Lot No 01229 when a provisional lease was issued to the plaintiff.
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[3] In 2003, title deeds were issued. These three parcels then became known as Lots 159 and 160 of Block 10 and Lot 157 of Block 16. They are collectively referred to herein as the subject land.

[4] Upon issuance of the title deeds, the plaintiff cleared the subject land and cultivated an oil palm plantation thereon which has been bearing fruits for several years.

PREVIOUS PROCEEDINGS

[5] In Suit No 22–208 of 2007–1, hereinafter referred to as 'the previous proceedings', the first to fifth defendants had asserted native customary rights ('NCR') over certain parcels of land, including the subject land.

[6] They will be referred as the claimants, insofar as the previous proceedings are concerned.

[7] The claimants sued:

(a) Sibu Slipway Sdn Bhd, the holder of a forest licence — the first defendant;

(b) Lambang Sinar Mas Sdn Bhd, the holder of two provisional leases — the second defendant;

(c) Indranika Jaya Sdn Bhd, the holder of the provisional lease over the subject land — the third defendant (subsequently, the plaintiff in the present action);

(d) Superintendent of Lands and Surveys, Samarahan Division — the fourth defendant;

(e) Director of Forest — the fifth defendant; and

(f) Government of Sarawak — the sixth defendant.

[8] All the defendants applied to strike out the claimants' action.

[9] Rhodzariah Bujang JC (as she then was) allowed the striking out application by the first to third defendants on 18 January 2010, relying on s 132(1) of the Land Code which reads:

> Subject to this Code, the registered proprietor of any estate or interest in land which this section applied shall, except in the case of fraud, hold such estate or interest subject to the interests noted on the Register but free from all other interest except:
>
> (a) The estate or interest of a proprietor included in the Register in priority to the title under or through which the first mentioned registered proprietor claims, being an estate or interest to which this section applies;
>
> (b) As regards any portion of land included in the issue document of title by virtue of a wrong description.

[10] As far as the third defendant (the plaintiff in the present action — referred to by its name Indranika Jaya Sdn Bhd in the narrative of the previous proceedings) was concerned, the sole exception of fraud was not in issue. Its proprietary rights were held to be indefeasible once the title deeds were issued in 2003. See *Nikodemus Singai & Ors v Sibu Slipway Sdn Bhd & Ors* [2010] MLJU 2212; [2010] 10 CLJ 383.

[11] The court held that it was a different matter as to whether the fourth, fifth, and sixth defendants could have lawfully issued the titles and forest licence if NCR could be proven. As such, the claim against the fourth, fifth, and sixth defendants was ordered to be determined at trial.

[12] An appeal against the decision on the indefeasibility of Indranika Jaya Sdn Bhd's titles was lodged by the claimants but was confirmed to have been withdrawn, by the claimants' solicitors in court on 8 June 2012. See common agreed bundle ('CAB') at pp 291–293 and 289–290. An application for extension of time to file an appeal dated 4 October 2016 was lodged, but that application was rejected by the Court of Appeal. See DWS1, Q&A 3 and Q&A 4.

[13] As for the trial, Lee Heng Cheong J held on 11 August 2014 that the claimants had proven their case against the fourth, fifth and sixth defendants and ordered damages to be assessed.

[14] A declaration which was inconsistent with the other parts of the order and also with the decision of Rhodzariah Bujang JC (as she then was) on the indefeasibility of Indranika Jaya Sdn Bhd's titles was erroneously included. It was on the basis of that erroneous declaration that the claimants contended that they had 'won' their case.

[15] An application for clarification by the third to fifth defendants followed. On 10 September 2014, the court varied its order and deleted the inconsistent declaration. See *Nikodemus Singai & Ors v Sibu Slipway Sdn Bhd & Ors* [2015] MLJU 646; [2016] 1 CLJ 618.

[16] Apart from seeking clarification to vary the order before the trial judge, the fourth, fifth, and sixth defendants also appealed to the Court of Appeal to reduce the NCR area, so as to reduce the damages to be assessed. The Court of Appeal reduced the NCR area, following which the claimants filed an application for leave to appeal against that decision. The leave application is yet to be heard.

[17] In a nutshell, the outcome in the previous proceedings was that:

(a) while the claimants obtained an order for assessment of damages against the fourth, fifth and sixth defendants and the NCR area was reduced on appeal; and

(b) Indranika Jaya Sdn Bhd's titles are indefeasible as there is no appeal as against the decision on 18 January 2010 striking out the claimants' action against it.

[18] As learned counsel for Indranika Jaya Sdn Bhd rightly points out, that interlocutory decision on 18 January 2010 which summarily disposed of the claimants' assertion of proprietary rights over the subject land, is valid and binding, until and unless reversed on appeal. See *Hartecon JV Sdn Bhd & Anor v Hartela Contractors Ltd* [1996] 2 MLJ 57.

PRESENT PROCEEDINGS

[19] For the avoidance of doubt, reference may be made to the cross-examination testimony of DW1:

Q: Do you know there is no Leave Motion for the Federal Court against the plaintiff in this case?

A: Yes, what I know is only against the government and the villagers also know this.

See NOP, p 99, lines 1–4.

[20] Thus, the real issue is whether the fifth defendants, with their 60–70 followers, had from 29 January–5/6 February 2016, trespassed onto the subject land and:

(i) 'blocked the plaintiff's vehicle from entering or leaving (its oil palm) plantation';

(ii) 'refused to allow the plaintiff and/or workers from carrying on with their works on the oil palm plantation ... including harvesting and transporting or delivering the harvested fruits to (the) oil palm mill', resulting in the plaintiff's operations in the oil palm plantation being brought to a standstill; and

(iii) the plaintiff was 'prevented from maintaining the Oil Palm plantation'.

See BOP, pp 6–7, statement of claim, paras 10–12.

[21] In *Kwong Hing Realty Sdn Bhd v Malaysia Building Society Bhd (American International Assurance Co Ltd, Third Party)* [1997] 5 MLJ 670; [1997] 1 CLJ Supp 167, KC Vohrah J defined trespass thus:

> Trespass to land consists of any unjustifiable intrusion by one person upon the land in the possession of another.

and further held:

> Any trespass is actionable per se, there being no necessity for pure actual damage.

[22] The defendants' contention that they had 'won their first case at the end of a full trial' (para 6 of the defence) and that 'they did instruct their counsel to appeal' (para 7 of the defence) is clearly not justification for their presence on the subject land. They knew or ought to have known that the plaintiff's ownership of the subject land could not be disputed after the appeal was confirmed to have been withdrawn by their previous solicitors on 8 June 2012.

[23] Even if the defendants were genuinely under the impression that they had won in the previous proceedings, that would not exculpate them from liability. Reference may be made to *Terra Damansara Sdn Bhd v Nandex Development Sdn Bhd* [2006] 6 MLJ 24 at p 33; [2006] 8 CLJ 657 at pp 665–666, where Malik Ishak J (as he then was) held:

> ... It is not the law that a man cannot be a trespasser unless he knows he is one (*Conway v Wimpey & Co (No 2)* [1951] 2 KB 266 at p 273). If the entry is intentional, it is actionable even though that entry was made under a mistake or the defendant honestly believed that the land was his own or, like the present case, the land was unoccupied and unalienated or that the defendant believed that he had a right of entry on the land.

[24] Reference is also made to *Awang Osen bin Awang Mat v Norhazlena bte Abdurani & Ors* [2004] 4 MLJ 238; [2004] 7 CLJ 1 where Abdul Aziz Abdul Rahim JC (as he then was) held:

> The law therefore is well settled: that the registration conferred on the registered proprietor an indefeasibility of title. In so far as it relates to the Sarawak Land Code, it is manifested in s 132. Though the indefeasibility of title may be challenged on the ground of fraud, such ground cannot be used to defeat a title acquired by registered bona fide purchaser and for value. This in my view is plain from the reading of s 134(2) which states as follows:
>
> > Nothing in this Code shall be construed as to place in doubt the title of any person who is a purchaser in good faith and for value of any interest, and who is registered as the proprietor of such interest, on the ground that the registered proprietor through or under whom he claimed was registered as proprietor through fraud or error, whether such fraud or error consisted in a misdescription of the land or otherwise.

[25] The defendants do not deny that:

(a) they were present on the subject land;

(b) together with 60–70 followers; and

(c) without the plaintiff's consent.

[26] The plaintiff's witnesses were not cross-examined on these aspects, with a view to establishing facts to the contrary. The unchallenged evidence would be deemed to be true. See *Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal* [1995] 2 MLJ 770; [1995] 3 CLJ 639 at pp 658–659. That the defendants were in fact on the plantation without the consent of the plaintiff is confirmed by DW1, as may be seen from the following re-examination:

> Q: Was *(sic)* there any meetings with the company during the period between 29 January and 5 February 2016?
>
> A: The meeting to explain the actual situation, no. At the same time the company asked us to move out from the plantation area.

See NOP, p 105, lines 4–8.

[27] On 5 February 2016, the plaintiff obtained an ex parte injunction through its counsel ('PW2') restraining the defendants from trespassing on the subject land and from carrying out the acts complained of.

[28] On 19 February 2016, an inter parte interim injunction was granted.

PERIOD OF TRESPASS

[29] PW3 and PW4 testified that a group of natives including the defendants were on the subject land without the plaintiff's consent, as from 29 January 2016 onwards. Their witness statements do not indicate the time when the trespass commenced but it may be safely taken that it first begun sometime between 6am–2pm on 29 January 2016, as their eight hour shift starts at 6am. PW4 further testified that the group comprised 60–70 individuals and from his witness statement, it can be taken that they were there until at least 5 February 2016. PW5 testified that '(b)etween the 30 January 2016–5 February 2016, I continued to negotiate with the five defendants. All to no avail'.

[30] PW2 testified that when the ex parte injunction order was served on the defendants on 5 February 2016, 'the defendants told me that they did not recognise the injunction order and they refused to leave the oil palm plantation'.

[31] PW2 added that 'in view of the defendants' refusal to obey the injunction then and the large number of natives present who would clearly cause a commotion or riot if we proceeded with evicting them, we felt that we should not force the matter then and there. As such, my process server and I left the oil palm plantation while the defendants and their followers remained as

trespassers on the oil palm plantation, and refusing to allow the Plaintiff's vehicles to transport out the oil palm fruits'.

See PWS2, Q&A 3.

[32] From PW2's reference to the affidavit of service, it appears that the ex parte injunction order was served on the defendants on 5 February 2016 between 5.30–5.35pm. See CAB, pp 69–70.

[33] In his witness statement, DW4 said that '(w)e went back home on the same day that we received the court injunction order ...'. See DWS4, Q&A 3.

[34] Although DW1 said that '(t)he moment I received the injunction from the plaintiff regarding the trespass by me and the other defendants, we immediately stopped all actions and removed and/or abandoned the blockade. I did not further dare to encroach or do further harm against the plaintiff as I was worried of the consequences of our actions' (see DWS1, Q&A 3), he admitted under cross-examination that '(w)e dismantled and cleared the blockade from 6am–8am the next day'. See NOP, p 98, lines 23–24.

[35] From the evidence, it would seem clear that the defendants and their 60–70 followers were trespassing on the subject land from 29 January 2016 (starting between 6am and 2pm) to 6 February 2016 (early morning). That would mean the trespass took place over a period of about eight days. Broadly, the plaintiff claims for:

(a) losses amounting to RM624,859 from blockade, prevention from harvesting ripened FFB and prevention of vehicles from transporting harvested FFB, whether FFB rotted;

(b) losses amounting to RM1,087,000 for loss of use of machinery; and

(c) staff productivity losses at the plaintiff's plantation office and Sibu office, and loss of director's fee (RM104,732.21).

Blockade, whether plaintiff's workers prevented from harvesting ripened FFB and vehicles prevented from transporting harvested FFB, whether FFB rotted (RM624,859)

[36] I will first deal with the blockade and the manner in which it was said to have been carried out, in particular, whether the plaintiff's workers were prevented from harvesting ripened FFB and its vehicles were prevented from exiting the plantation with harvested FFB which allegedly rotted as a consequence, since that was the main area on which the parties focused, during the trial.

[37] There is no doubt that the defendants and their followers had set up a blockade. In DWS1, Q&A 3, the first defendant states that 'I along with several other villagers, including the fourth defendant, set up a blockade to prevent the plaintiff in this suit from entering our NCR lands and to prevent further damage being done to our NCR lands'. See also the cross-examination testimony of DW1 in NOP, p 95, lines 11–14. DW3 refers to the blockade by the defendants and the villagers in his witness statement, DWS3.

[38] Though the fourth defendant states that '(w)e did not however made any attempts to stop the plaintiff's workers, vehicles or contractors etc from passing the said gate. We merely waited there for news (DWS4, Q&A 2)', I do not find such averment credible bearing in mind the consistent testimony of the plaintiff's witnesses.

[39] According to PW2 (the plaintiff's solicitor), 'the defendants said that they refused to comply with the injunction order and that the plaintiff's workers were still not allowed to transport out the oil palm fruits' and 'in view of the defendants' refusal to obey the injunction then and the large number of natives present who would clearly cause a commotion or riot if we proceeded with evicting them, we felt that we should not force the matter then and there. As such, my process server and I left the oil palm plantation while the defendants and their followers remained as trespassers on the oil palm plantation, and refusing to allow the plaintiff's vehicles to transport out the oil palm fruits'.

[40] I have no reason to doubt the testimony of PW3, an auxiliary policeman, who gave evidence that he (together with one Shawn Isaac and PW4) started their shift at 6am on 29 January 2016 and were told by the defendants and other villagers that 'no vehicle were allowed to enter or leave the back entrance gate'. See DWS3, Q&A 4 and 5.

[41] Even after the plaintiff's land settlement officer ('PW6') arrived on 30 January 2016, the defendants 'continued to refuse the plaintiffs from harvesting oil palm fruits and transporting the harvested oil palm fruits to the mill', according to PW4, an auxiliary policeman.

[42] In view of DW1's admission that 'the decision at that time was not for the company to sell the fruits' (see NOP, p 104, lines 23–25), it is all the more likely that the plaintiff's vehicles were not allowed to exit the plantation with the harvested FFB.

[43] Much time was spent by learned counsel for the defendants in attempting to show that there were alternative routes out of the plantation and

A that the plaintiff's lorries were able to go out of the plantation to deliver the harvested FFB, by various 'jalan tikus' and to the boom barrier gate at Sg Ba.

[44] DW2 was called to establish the existence of 'jalan tikus' within the plantation which would enable the lorries to exit. From the evidence, it would appear that they were only pathways which allowed for human or motorcycle traffic, or small vehicles at most but not lorries. Although DW2 said that the jalan tikus would allow a 'motorcycle or other vehicles' to pass through, he did not specify the kind of vehicle or testify that lorries could pass through. It is for the defendants, who wish the court to believe that the jalan tikus could be used by lorries to transport out harvested FFB, to prove their assertion. See s 103 of the Evidence Act 1950.

[45] As for the boom barrier gate at Sg Ba, which learned counsel for the defendants argue provides a route for the plaintiff's lorries to exit, I accept PW4's evidence:

> Q: Can you tell the court Why the plaintiff's vehicle to use the road leading to Sg Ba, from 29th 20 January 2016 to 5th 21 February 2016?
>
> A: It can be used but the plaintiff's vehicle were inside. All the plaintiff company's vehicles were inside the vicinity of the plaintiff's office. The plaintiff's cannot pass by the main gate if they wanted to go to Sg Ba.

See NOP, p 46, lines 19–26.

[46] Given that the plaintiff's estate office was only accessible through the main gate and the back entrance to the mill (both of which access/exit points were the subject of the blockade), and that the plaintiff's lorries were all within the vicinity of the said office, the lorries could not have transported the harvested FFB out of the plantation through the third route at Sg Ba/Sateman although that route was not blocked (see the cross-examination testimony of PW4, NOP, p 45, lines 1–10). In this regard, I refer to the following testimony of DW1 together with notation:

> PUT: That access to the estate office can only be through the main gate and the back entrance to the mill.
>
> A: There are other access points to the plantation. To the estate office, I agree the access is only through the main gate and the back entrance to the mill (confirmed after DC asked for clarification and for the whole answer to be recorded).

See NOP, p 93, lines 18–24.

[47] Further, DW3 had admitted that he did not see any lorries going out of the plantation during the time of the blockade:

Q: You said you saw the lorries coming out from the oil palm plantation before and after you involved with the blockade.

PUT: There were no lorries coming out from the oil palm plantation during the time of the blockade. Do you agree?

A: I agree.

See NOP, p 118, lines 14–18.

[48] Learned counsel for the defendants attempted to repair the damage in re-examination:

... this answer is in contradiction to your A2 of your witness statement. Can you please explain which answer is correct?

A: I agree to the question just now when I involved with the blockade I do not know whether there is any lorry coming in and out of the oil palm plantation but I do know there is lorry coming in and out using the alternative road.

See NOP, p 119, lines 15–27.

[49] The admission under cross-examination is to be preferred. DW3 was, by his own account (NOP, p 116, lines 19–25 and p 117, lines 1–13) at the main gate throughout the blockade and could not have seen any lorries going out of the alternative route by Sg Ba. It also to be noted that in his re-examination testimony, DW3 did not explain how he knew there were lorries going out, using the alternative road.

[50] Indeed, his re-examination testimony 'I do know there is lorry coming in and out using the alternative road' does not disclose the source of his alleged knowledge.

[51] Further, I do not give credence to his averment in DWS3, A4 ('I say that when I was riding my motorcycle heading towards Kampung Steman via Jalan Engsegei/Lubuk Punggor/Kampung Gumpey I used to come across the plaintiff's lorries/trucks filled with FFB which came out from the oil palm plantation and heading towards the main road'), since no date is given as to when he saw those lorries going out of the plantation; and he had said he was at the main gate throughout the blockade from 29 January–5 February 2016.

[52] Furthermore, I refer to the evidence in chief of PW2 relating to his presence at the plantation on 5 February 2016 when the trespass had almost run its course:

... the defendant said that they refused to comply with the injunction order and that the plaintiff's workers were still not allowed to transport out the oil palm fruits ...

During the said services (of the cause papers, including the ex-parte injunction order), the defendants told me that they did not recognise the injunction order and

A they refused to leave the oil palm plantation. They also said that the plaintiff was still not allowed to transport the oil palm fruits to the mill.

... my process server and I left the oil palm plantation while the defendants and their followers remained as trespassers on the oil palm plantation, and refusing to allow the plaintiff's vehicles to transport out the oil palm fruits.

B

See PWS2, Q&A 3.5, 3.9 and 3.10.

[53] It can be seen that even though the trespass was already into the eighth day, the defendants were still refusing to allow the plaintiff's lorries to leave the C plantation with the harvested FFB.

[54] To assess the damages for the defendants' act of preventing the plaintiff's lorries delivering FFB from the plantation to the mill and for the other acts complained of, I am guided by the principle laid down in *Dodd* D *Properties (Kent) Ltd & Anor v Canterbury City Council and others* [1980] 1 All ER 928 at p 938 (adopted in *Kris Angsana Sdn Bhd v Eu Sim Chuan @ Eu Sam Yan & Anor* [2007] 5 MLJ 13; [2007] 4 CLJ 293). In *Dodd*, Donaldson LJ held:

E The general object underlying the rules for the assessment of damages is, so far as is possible by means of a monetary award, to place the plaintiff in the position in which he would have occupied if he had not suffered the wrong complained of, be that wrong a tort or a breach of contract.

F **[55]** The plaintiff has not proven on the balance of probabilities that it has suffered losses as a result of its plantation workers being prevented from harvesting FFB during the trespass period and from rotten FFB. The plaintiff has failed to show a causal link between the defendants' trespass and the alleged losses, for the following reasons:

G

Prevention from harvesting during trespass period did not result in tangible loss

(i) PW5 (the accountant/finance manager of the plaintiff) says that the plaintiff is claiming RM624,859 for the loss of sale, and alludes to the H plaintiff being prevented from harvesting FFB during the trespass which it could have sold to the mill. See PWS5, Q&A 8. There is no merit in this claim since there was nothing to prevent the plaintiff, after the trespass ended in the early hours of 6 February 2016, from harvesting the FFB which had ripened before and during the trespass. I

Any FFB ripened before the trespass started were transported out

(ii) a quick perusal of exh P1(19) will show that there were 20 lorry trips for the transportation, of the FFB on 6 February and three lorry trips on

7 February, as compared to five lorry trips on 14 February and four lorry trips on 21 February. There is a slight discrepancy in that exh P1(27) shows that there were 21 lorry trips.

On another note, from exh P1(4–10), it can be seen that there were daily lorry trips transporting FFB before and after the period of trespass, including two lorry trips on 29 January 2016 itself. So, any FFB which had ripened before the trespass started would have been transported out.

While the probative value of those documents is questionable, it was common ground that the lorry trips were made.

See NOP, p 60, lines 18–27.

In any event, no satisfactory evidence of FFB rotting as a result of the trespass

(iii) all the witness statements of the plaintiff did not offer any evidence as to the lifespan of FFB, let alone provide evidence that FFB may perish or lose its commercial characteristics in less than ten days. As such, I do not find the testimony of PW6, that he had seen rotten FFB on the plantation during the trespass, convincing;

(iv) the lifespan of FFB is at least ten days (which was advanced by the plaintiff in its submissions, albeit by relying on an article which was not included in the trial bundles), whereas the trespass only lasted about eight days. Indeed, PW5, although he was not a field man, said that the FFB would be harvested every 10–14 days, which would be indicative of the FFB having a lifespan longer than ten days. PW5's evidence is consistent with the testimony of DW4 who has an oil palm plantation of his own. See NOP, p 122, lines 13–17;

(v) there was no photograph adduced to show rotting or rotten FFB, although photographs were taken by PW4 of the defendants and their followers at the front gate as well as the back gate, their huts and tents which were put up, various banners at various places, and of PW6 negotiating with the defendants and their followers. See pp 50–58 of CAB and pp 1–11 of PSBOD.

There were also a number of photographs taken to prove the service of the cause papers on the defendants on 5 February 2016 (see pp 77–83 of CAB) but no photographs were taken of the alleged rotten FFB;

(vi) in an attempt to establish the plaintiff's losses, PW5 relied on exh P1(27). See NOP, p 65, lines 15–24. P1(27) purportedly shows the quantity of rejected FFB on each of the lorry trips on 6 and 7 February 2016. However, if one were to refer to p 19 of exh P1, it can be seen in the column under the heading 'Timb reject' (which may be taken to be 'Timbangan reject'), there is no rejected FFB on 6 February and only 0.11 metric tonne which was rejected on 7 February.

In the absence of any explanation by PW5 or any of the plaintiff's

witnesses on this seeming and material contradiction between pp 19 and 27 (and there was no such explanation), I find the plaintiff has failed to prove its alleged losses arising from rejected FFB. On a side note, the 16th trip (QRH 6923) on p 27 is not on p 19 of exh P1;

(vii) aside from the inconsistency or contradiction between pp 27 and 19, it may be added that these pages are merely summaries for which primary evidence was not given. The source documents were not produced. Neither did PW5 say that he was the person who had personal knowledge of the purported FFB rejection.

As explained by the Court of Appeal in *Lay Hong Food Corp Sdn Bhd (previously known as Lay Hong Poultry Processing Sdn Bhd) v Tiong Nam Logistics Solutions Sdn Bhd* [2018] 2 MLJ 66; [2017] 10 CLJ 680, the Supreme Court case of *KPM Khidmat Sdn Bhd v Tey Kim Suie* [1994] 2 MLJ 627; [1994] 3 CLJ 1, established the rule of evidence that 'when documentary evidence is tendered, primary evidence of the said document must be adduced except in cases under s 65 of the Evidence Act 1950'.

Zabariah Mohd Yusof JCA, in delivering the judgment of the Court of Appeal, pointed out that 'PW2 in his evidence admitted that the 'Lay Hong Billing Summary' from January 2008–March 2009 (p 503 CB 3) was produced as proof of total sum of RM1,555,675.14 and that he was not the maker of such summary' and held:

> Balance sheets or summary of billings do not by themselves prove the facts stated therein. It has to be proven like any other fact, be it affidavit or otherwise. The facts as stated in the summary of billings are mere statements and it cannot be taken as proving that the statements are correct. It has to be proved by calling the maker to explain the facts and the basis of the calculation of the amount which is being claimed. In our present case, no evidence of the basis of the summary of the billings was adduced.

[56] The plaintiff's claims of RM147,329 and RM477,530 for the 'loss of FFB' in January and February 2016 are thus rejected. See plaintiff's closing submission, para 3(b), items (I) and (II).

[57] To elaborate, PW5 was based in the Sibu office (NOP, p 66, lines 12–14) and was, by his admission, not present during the time of the trespass (NOP, p 58, lines 1–19).

Whether plaintiff had suffered losses amounting to RM1,087,000 for loss of use of machinery

[58] As for the claim of RM1,087,000 for loss of use of machinery item (III) vide para 17 of the plaintiff's reply submission, it is at most pleaded ambiguously:

> The defendants and these villagers had also blocked the plaintiff's vehicles from entering or leaving the said oil palm plantation. The defendants together with their followers also refused to allow the plaintiff and/or its workers from carrying on with their works on the oil palm plantation on the said Land, including harvesting and transporting or delivering harvested fruits to oil palm mill.

See BOP, p 6, statement of claim, para 10.

> Due to the above, the plaintiff's operations in the said Oil Palm Plantation have all been brought to a stand still.

See BOP, p 6, statement of claim, para 11.

[59] Notwithstanding the manner in which the plaintiff's claims were pleaded, it took the liberty of extending its claims to rental of 100 vehicles as well as machineries and equipment.

[60] The claim for rental of 100 vehicles is clearly exaggerated. A perusal of exh P1(19) will show that of the 20 trips purportedly made on 6 February 2016, the lorry bearing the licence plate QSV3823 alone made seven trips; and of the eight trips purportedly made on 8 February 2016, the lorry bearing the licence plate QSX3877 made two trips as the lorry bearing the licence plate QSW1361. In other words, only a few lorries were used each day to transport the harvested FFB and the claim that 100 vehicles were idling is clearly exaggerated.

[61] Further, the claim for hourly rental of 100 vehicles on a daily basis is multiplied by ten days, whereas the trespass was over a period of eight days. The rental was claimed for ten hours per day.

[62] PW5 referred to tax invoices issued by WFM Plantation Sdn Bhd in exh P1(36–41). These so-called invoices lack credibility. For example, the tax invoice in exh P1(37) dated 31 January 2016 refers to rental of RM6,800 for a vehicle with the licence plate QRH8921. A perusal of the list of vehicles in exh P1(43) item 78 discloses that the hourly rental rate is RM200. Assuming that the invoice dated 31 January was issued after working hours, and based on the ten hours of rental per day for three days (being the days of trespass then), the figure is RM6,000, not RM6,800.

[63] In respect of WFM Plantation Sdn Bhd's invoice dated 31 January 2016 in exh P1(36), there is a claim for rental for QSW1332 totalling RM6,800. It can be seen from exh P1(43) item 84, that the hourly rate is RM90. Since the plaintiff's claim is for ten hours per day x 3 days at RM90 per hour, the amount for which the defendants ought to be liable would be RM2,700, not RM6,800.

[64] In respect of WFM Plantation Sdn Bhd's invoice dated 29 February 2016 in exh P1(40), item 9, there is a claim for rental for QSX772 totalling RM6,800. It can be seen from exh P1(43) item 81, that the hourly rate is RM200. Since the plaintiff's claim is for ten hours per day x 5 days (1–5 February 2016) at RM200 per hour, the amount for which the defendants ought to be liable would be RM10,000, not RM6,800.

[65] There are other discrepancies but I need not delve into them. Suffice to say that no reason was given as to why the vehicles needed to be rented for ten hours each day, whether they were used for ten hours each day, whether the purported rental charged are commercial rates and so on.

[66] The manner in which the plaintiff attempted to prove its purported loss of RM1,087,000 for idling vehicles and machineries/equipment is unsatisfactory. As was held by Lord Goddard in *Bonham-Carter v Hyde Park Hotel Ltd* 64 TLR 177 at p 178 and adopted by the Federal Court in *Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd* [1994] 3 MLJ 777; [1995] 1 CLJ 15:

> ... plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars, so to speak, throw them at the head of the court, saying: 'This is what I have lost, I ask you to give me these damages'. They have to prove it.

[67] In addition, the list of the allegedly idling vehicles and machineries/equipment is a summary which requires the maker to give evidence and to provide the source documents, more so in the face of the discrepancies between the purported tax invoices in exh P1(36–41) and the said list in exh P1(42–43).

Whether the plaintiff has suffered staff productivity losses at its plantation office and Sibu office, and loss of director's fee (RM104,732.21)

[68] I turn now to deal with the plaintiff's claims for:

> The sum of RM10,380.49 for the loss of monthly staff working hours in January 2016.
>
> The sum of RM34,102.93 for the loss of monthly staff working hours in February 2016.
>
> The sum of RM15,444.30 for the Director and Sibu Office salary in January 2016.
>
> The sum of RM44,804.49 for the Director and Sibu Office salary in February 2016.

See plaintiff's reply submission, para 17, items (IV), (V), (VI) and (VII) which can be dealt with together.

[69] In dealing with the plaintiff's allegation that it had incurred losses by paying its workers wages and salaries even though they were prevented from working, I find the following cross-examination of PW5 particularly pertinent:

> PUT: There was no loss in productivity in respect of wages and salaries of the plaintiff's workers because they were all working and not prevented by the villagers from the defendants' villages.
>
> A: The workers (executive and non-executive staffs) while continuing their daily work were actually doing duties relating to how to solve the problem caused by the blockade in the incident because normal operation were not on-going.
>
> PUT: What you just said are not true and that the workers (executive and non-executive staffs) were actually doing their daily duties and not otherwise.
>
> A: They were working as normal but the jobs were not income producing. During the blockade there was no production. The estate couldn't receive purchases such as ...

See NOP, p 58, lines 26–27, p 59, lines 1–15.

[70] From the cross-examination testimony, it emerges that while the plantation workers were prevented from working or harvesting, the office workers were working normally. In re-examination, PW5 tried to repair the damage by saying that the office workers were not working because there was no production on the estate but I do not find the belated explanation credible.

[71] PW5's testimony under cross-examination that the office workers were working normally is to be preferred. It is less likely that they were doing nothing and just thinking of ways to solve the trespass problem, since the plaintiff had deployed PW6 to assist in resolving the trespass from 30 January onwards and had also instructed its solicitors to apply for interim interlocutory injunctive relief.

[72] In respect of the following cross-examination of PW5:

> Q: Can you tell the court why the plaintiff is claiming based on the payroll of Tabaruk Abadi Sdn Bhd and United Teamtrade Sdn Bhd for this case?
>
> A: At Sibu head office we practice the sharing of man power resources for better efficiency. For each person under the payroll while he may be under payroll of one company he has to complete the same job for all the three companies. Therefore when the incident happen it create additional duties and works at Sibu head office. Our role at Sibu head office is to provide support and planning for our estates. Therefore when the incident at Indranika Jaya happens we need to do more works to solve the problem at Indranika Jaya. As a result, less attention and working hours allocated to the two other companies.

A The witness relied on exh P1(49–50) which were merely summaries of the alleged losses.

[73] Although PW5 inconsistently testified that the office workers had to do additional work, on how to deal with the trespass, he did not give evidence on B whether the plaintiff had paid them extra remuneration on account of the additional work. And although PW5 testified that the common pool office workers consequently did less work for Tabaruk Abadi Sdn Bhd and United Teamtrade Sdn Bhd, no evidence was adduced to prove what was the work or value of the work not done.

C

[74] Insofar as the Sibu office is concerned, PW5 admitted that no overtime was paid. In any case, the claim for purported losses for a director's salary and the Sibu office staff is too remote.

D

[75] As the plaintiff had failed to prove its losses, the defendants' omission in cross-examining the plaintiff's witnesses on whether the lorries and machineries were used, and whether the office staff and plantation workers worked over the weekend of 30–31 January 2016 is of no significance.

E

[76] In arriving at the findings set out above, the *ratio* of the Court of Appeal in *Sambaga Valli a/p KR Ponnusamy v Datuk Bandar Kuala Lumpur & Ors and another appeal* [2018] 1 MLJ 784; [2017] 1 LNS 500 is borne in mind:

> ... it is fundamental and trite that a plaintiff claiming damages must prove his F damage. A plaintiff cannot simply make a claim without placing before the court sufficient evidence of the loss it has suffered even if it is otherwise entitled in principle to recover damages. The law, however, does not demand that the plaintiff prove with complete certainty the exact amount of damage that he has suffered.

G **[77]** Instead of relying on the self-serving summaries in exh P1(1–55), the plaintiff ought to have called the maker(s) of P1(19) and P1(27) to explain the inconsistency or contradiction between exh P1(19) which shows that there was no rejection of any FFB except for one trip on 7 February 2016, and exh P1(27) which purportedly showed a rejection of FFB totalling 169 metric tonnes.

H

[78] The plaintiff also ought to have called the maker(s) of the lists and tax invoices by related companies which purported to prove the loss arising from idling vehicles and machineries. The need is all the more compelling because there were discrepancies in the calculations, and a credible explanation was I needed as to how the rental rates were calculated, whether they were arm-length rates, and to prove the use and purpose of the 100 vehicles and machineries that were allegedly left idling, whether the lorries could be used for the other companies within the WFM Group since the plaintiff's plantation comprised 4,600 hectares while the total oil palm plantation area of the WFM

Group comprised 18,000 hectares (NOP, p 57, lines 11–16). The defendants were also deprived of the opportunity to cross-examine the plaintiff as to whether the contents of the tax invoices were genuine and so on.

[79] No loss accrues as a result of the loss of use of the lorries or vehicles. Any delayed use would have been made good after the eight days of trespass, in that the FFB could have been and were in fact transported out of the plantation to the mill from 6 February 2016 onwards. If at all they can be relied upon or for what they are worth, the delivery lists relied upon by the plaintiff vide exhP1(9) show that lorries were sending out FFB even up to the day the trespass started on 29 January 2016. In any event, there was no satisfactory evidence that there was FFB harvested before the trespass began which had rotted because they could not be transported out of the plantation.

[80] The plaintiff's inability to prove losses arising from the alleged idling vehicles and machineries is compounded by hearsay, which is evident from the cross-examination of PW5:

> PUT: There was no idling machinery so that there was no loss in idling machinery.
>
> A: I was informed by the estate that these machineries were lying idle in the estate.

[81] PW5 did not even give any indication as the identity of the person from the estate who told him that those machineries were lying idle in the estate.

NOMINAL DAMAGES

[82] The plaintiff has failed to discharge its burden of proving that it has suffered the special damages (which must not only be pleaded but also strictly proved) as enumerated in its closing submissions (para 35(b)) and its reply submissions (para 17). But that does not mean the Plaintiff will not get any relief or recompense. Nominal damages can and ought to be awarded.

[83] In this regard, reference is made to *Guan Soon Tin Mining Co v Wong Fook Kum* [1969] 1 MLJ 99 where Ong Hock Thye FJ held:

> The respondent, as plaintiff, of course had to discharge the burden of proving both the fact and the amount of damages before he could recover. Where he succeeded in proving neither fact nor amount of damage he must lose the action or, if a right was infringed, he would recover only nominal damages. Where he succeeded in proving the fact of damage, but not its amount, he would again be entitled to an award of nominal damages only.

[84] Or, as explained in *McGregor on Damages* (18th Ed, 2009)

A para 10–004, nominal damages may be awarded where the fact of a loss is shown but the necessary evidence as to its amount is not given.

[85] Varying amounts of nominal damages have been awarded:

B In *Chong Kin Kong @ Chong Kim Kong & 4 Ors v Hiew San Ngok & 2 Ors* [1997] MLJU 1; [1997] 1 LNS 357, Malanjum J (as he then was) held that the plaintiffs have failed to establish their claim as to the volume of sand and pebbles excavated from their land by the third defendant. And it is their burden to do so (see *Popular Industries Ltd v Eastern Garment Manufacturers Sdn Bhd* [1989] 3 MLJ 360). Thus, it would not be possible to compute their actual loss. However, that should not C mean that they get nothing. They should be entitled at least to nominal damages (see *Popular Industries Ltd*). In my judgment the sum of RM5,000 should be sufficient nominal damages for the plaintiffs due to the negligence on the part of the third defendant in encroaching and excavating on their land.

D In *Teik Huat Farming Sdn Bhd & Ors v Megat Ahmad Shahrani Sdn Bhd & Ors* [2016] 8 MLJ 532; [2015] 9 CLJ 511, the plaintiffs were prawn breeders whose farms were flooded due to the negligence of the defendants. In that case, it was held that 'there is no evidence to show the expenditure that the plaintiffs have incurred and would have to incur to generate the loss of profits claimed as E damages. No were tax returns produced to show the profits earned by the plaintiffs in the previous years. There is thus no evidence to show the amount of damages suffered by the plaintiffs as loss of profits'. The court nonetheless awarded the plaintiffs RM50,000 nominal damages.

F In *Amm a/l Joy (suing as Chairman Committee Members of Wat Boonyaram) v Chuan Seng Sdn Bhd* [2018] 5 MLJ 255; [2018] 1 LNS 474, nominal damages of RM57,623 were awarded in a trespass case. The Court of Appeal arrived at that amount, taking into account the fair market rental value of the G actual area trespassed upon.

[86] In the case at hand, a blockade was set up by the defendants and their 60–70 followers on the subject land without the consent of the plaintiff. It went on from the morning of 29 January 2016 to the morning of 6 February H 2016. The plaintiff was able to prove that its lorries were prevented from delivering FFB to the mill and that its workers were prevented from working but did not prove the amount of its loss.

[87] The Plaintiff did not adduce any evidence that FFB could rot in less I than ten days. It did not adduce satisfactory evidence that there were FFB which had been harvested prior to the commencement of the trespass and which had rotted before the crops could be delivered to the mill. The plaintiff itself actually provided evidence that there were daily lorry trips out of the plantation, which makes it even less probable that FFB harvested before

29 January 2016 had rotted due to the blockade.

[88] Based on those circumstances, an award of RM20,000 as nominal damages should suffice.

EXEMPLARY/AGGRAVATED DAMAGES

[89] The plaintiff cannot recover exemplary damages, as the circumstances of the case do not fall into either of the two categories identified by Lord Devlin in *Rookes v Barnard* [1964] AC 1129 (adopted by our courts, for instance, in *Kerajaan Negeri Selangor & Ors v Sagong bin Tasi & Ors* [2005] 6 MLJ 289; [2005] 4 CLJ 169):

> The first category is oppressive, arbitrary or unconstitutional action by the servants of the government.
>
> Cases in the second category are those in which the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff.

[90] Turning now to the plaintiff's claim for aggravated damages, I am guided by what Zawawi JCA (as he then was) had to say in *Sambaga Valli KR Ponnusamy v Datuk Bandar Kuala Lumpur & Ors and another appeal*:

> ... aggravated damages are classified as a species of compensatory damages, which are awarded as additional compensation where there has been intangible injury to the interest of personality of the plaintiff, and where this injury has been caused or exacerbated by the exceptional conduct of the defendant.

[91] Aggravated damages are a form of compensation for non-pecuniary loss or damage such as loss of reputation, loss of dignity, humiliation and mental stress. They are more frequently encountered in defamation, assault and false imprisonment cases. They have also been awarded in trespass, conversion and detinue cases, such as *Sambaga Valli KR Ponnusamy v Datuk Bandar Kuala Lumpur & Ors and another appeal* and more recently, in a medical negligence case: *Dr Hari Krishnan & Anor v Megat Noor Ishak bin Megat Ibrahim & Anor and another appeal* [2018] 3 MLJ 281; [2018] 3 CLJ 427.

[92] A perusal of PWS1, PWS5 and PWS6 (which were the witness statements of the plaintiff's managing director, accountant and land settlement officer) does not disclose any evidence of mental anxiety or distress; neither did their cross-examination testimony. PWS1 only focused on the alleged pecuniary losses of the plaintiff (Q&A 15). The plaintiff's other witnesses were two auxiliary policemen and its lawyer. There is thus no justification for an award of aggravated damages, reprehensible as the plaintiff may find the conduct of the defendants.

[93] Further and/or in the alternative, the plaintiff is a limited company which by legal creativity is an artificial entity incapable of feelings, distinct from its shareholders. Although aggravated damages have been awarded to companies for loss of reputation in defamation cases (see, for instance, *Utusan Melayu (M) Bhd v Othman bin Hj Omar* [2017] 2 MLJ 800; [2017] 2 CLJ 413), such is not the plaintiff's claim here.

[94] In *Messenger Newspapers Group Ltd v National Graphical Association* [1984] IRLR 397, Caulfield J held that aggravated damages could be awarded to limited companies for injury to feelings and the decision was followed in *WLP Industrial Solutions (M) Sdn Bhd v KL-Kepong Rubber Products Sdn Bhd* [2011] 6 MLJ 623; [2011] 1 LNS 818.

[95] However, in *Eaton Mansions (Westminster) Ltd v Stinger Cia de Inversion SA* [2013] EWCA Civ 1308, the English Court of Appeal, in its unanimous decision delivered through Patten LJ, held that 'the decision in *Messenger* on aggravated damages has not been followed by other judges at first instance; most notably by Gray J in *Collins Stewart Ltd v The Financial Times Ltd (No 2)* [2006] EMLR 5 at paras [30]–[32] and by Tugendhat J in *Hays plc v Hartley* [2010] EWHC 1068 (QB) at para [24] and *Metropolitan International Schools Ltd v Designtechnica Corporation* [2010] EWHC 2411 at para [14]. We should, in my view, take the opportunity to hold that it was wrongly decided. Aggravated damages are not recoverable by a limited company for the reasons I have stated'.

[96] In *ATU and others v ATY* [2015] 4 SLR 1159, the Singapore High Court held that:

> a corporate entity may only recover damages appropriate for vindication of its injured reputation; it may not recover for injury to its feelings. As was stated by Lord Reid in *Rubber Improvement Ltd v Daily Telegraph Ltd* [1964] AC 234 at 262, '[a] company cannot be injured in its feelings, it can only be injured in its pocket'.

[97] In the premises, I am inclined to hold that the plaintiff, being a company with limited liability, cannot be the recipient of an award of aggravated damages for injury to its feelings, more so as there was no evidence of such injury.

[98] I should add that during the course of clarification just before the judgment was delivered, learned counsel for the plaintiff stated that the claim for exemplary and aggravated damages was abandoned, which is why arguments were not canvassed and authorities were not cited in the submissions.

CONCLUSION

[99] The evidence is overwhelming that the defendants and their 60–70 followers have trespassed onto the plaintiff's subject land. It appears that the defendants are still trying to assert proprietary rights over the subject land although there is no appeal against the decision in the High Court on 18 January 2010 by which the plaintiff's titles were held to be indefeasible. The notice of motion for leave to appeal to the Federal Court, as explained earlier, does not concern the decision of the High Court on 18 January 2010. There is no lawful justification for the presence of the defendants and their followers on the subject land between 29 January–6 February 2016, to which the plaintiff did not give consent and to which it objected.

[100] The defendants have not given up their claim of proprietary rights and assert through DWS1 and their counsel that the claim is still a live issue in the Federal Court, although that is clearly not the case. It appears that the defendants will continue to trespass onto the plaintiff's subject land as they throughout the trial maintained that they had existing farms there. Further, PW1 gave evidence that the defendants had returned to the plaintiff's subject land after 6 February 2016.

[101] In concluding, I grant the plaintiff the prohibitory injunctions as prayed for in its statement of claim, nominal damages of RM20,000, interest thereon at the rate of 5%pa from the date of judgment to the date of full payment, and costs of RM30,000 subject to payment of the allocatur fee.

Prohibitory injunctions and nominal damages of RM20,000 granted to plaintiff with costs of RM30,000.

Reported by Dzulqarnain Ab Fatar